LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 11 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
612 South Flower Street,
Los Angeles, Calif. 90017,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Grounds for Rehearing	1
A. This Is a Proper Matter for Review on Certiorari	1
B. The Tax Court Departed From the Accepted and Usual Course of Judicial Proceedings	3
C. The Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings	4
Conclusion	4
Appendix A. Tax Court Rules of Practice, Rule 31(b).	

TABLE OF AUTHORITIES CITED

Cases

General Utilities & Operating Co. v. Helvering, 296 U.S. 200, 56 S. Ct. 185	3
Harbor Plywood Corp. v. Comm'r, 143 F. 2d 780	4

Rules

Rules of the Supreme Court of the United States, Rule 58(2)	1
Tax Court Rules of Practice, Rule 31(b)(4)	3
Tax Court Rules of Practice, Rule 31(b)(6)	3

IN THE

Supreme Court of the United States

October Term, 1967
No. 1389

ADOLPH WEINBERG and ETTA WEINBERG,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITION FOR REHEARING.

Petitioner presents its petition for a rehearing of this Court's order dated June 17, 1968, denying the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and, in support thereof, respectfully shows:

Grounds for Rehearing.

A. This Is a Proper Matter for Review on Certiorari.

There are "substantial grounds available to petitioner although not previously presented." Rule 58(2).

Specifically, these substantial grounds, not presented to the Court in the prior petition for writ of certiorari, are:

(1) That the United States Court of Appeals for the Ninth Circuit has so far *sanctioned a de-*

parture by the Tax Court of the United States from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision; and

(2) That the United States Court of Appeals for the Ninth Circuit has *itself so far departed* from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Tax Court (notwithstanding the assertions by the Commissioner in the notice of deficiency and a written stipulation that petitioners had transferred farm crops to various corporations) considered for the first time *after* trial the issue of whether the farm crops were transferred. The Tax Court then determined that *the burden of proof* should be upon petitioners to establish that these farm crops were transferred, and determined that petitioners had *failed to meet this burden of proof*. Petitioners had no occasion to know until after the trial that this stipulated matter was even in issue.

Petitioners had no occasion to request relief from this action until after the receipt of the decision of the Tax Court. Thereupon, petitioners filed a timely Motion to Reopen the Proceedings to Receive Additional Evidence, since the issue determined by the Tax Court was not one to which the petitioners, in light of the notice of deficiency and stipulation, had addressed their proofs of trial. The Tax Court denied the motion. The petitioners were, therefore, deprived of an opportunity to present evidence upon a material issue which they could reasonably have assumed not to have been in dispute. By so doing, the Tax Court departed from the accepted and usual course of judicial proceedings.

The United States Court of Appeals for the Ninth Circuit *sanctioned this departure* by failing to consider this issue on appeal. In fact, the Court of Appeals affirmed the Tax Court's decision "on the ground that the Tax Court was not clearly wrong in determining that the *taxpayers failed to establish* that they had transferred growing, unharvested crops."

The Court of Appeals thereby not only *sanctioned* this departure, they *adopted* it.

B. The Tax Court Departed From the Accepted and Usual Course of Judicial Proceedings.

The usual course of judicial proceedings for the Tax Court is, with respect to matters set forth in written stipulations, established by Rules of Practice of the Tax Court. These rules provide in part, Rule 31(b)(4) and 31(b)(6) that objections to a stipulation are required to be made in the stipulation or at the trial. As stated in the opinion of the Tax Court and as conceded by the Commissioner:

> "Respondent makes this argument, [that proceeds from the sale of the crops, rather than growing or matured crops themselves, were transferred to the corporations in exchange for their stock] for the first time, in his final brief and further urges that the stipulation to the contrary should be disregarded." [Opinion of the Tax Court 44 T.C. 233]

As was stated in *General Utilities & Operating Company v. Helvering*, 296 U.S. 200, 56 S. Ct. 185:

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and any other evidence properly are accommodated to issues adequately raised."

C. The Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings.

The usual course of judicial proceedings on appellate review is not to affirm a deficiency assessment where the issues actually determined by the Tax Court were not raised by the notice of deficiency or otherwise at the trial before the Tax Court.

> "This court will not consider in support of a deficiency assessment, reasons not advanced by the Commissioner in his deficiency notice or before the Board of Tax Appeals, especially when the taxpayer has been deprived thereby of the opportunity to present evidence material thereto." *Harbor Plywood v. Comm'r,* (C.A. 9th 1944) 143 F. 2d 780.

The Court of Appeals did affirm the decision of the Tax Court on the issue of whether the *taxpayers had failed to establish* that they had transferred growing, unharvested crops. The deficiency assessment was supported on review in a situation where the taxpayers had been deprived of an opportunity to present evidence material to an issue of whether farm crops were transferred, the Court of Appeals thereby departing from the usual course of appellate review.

Conclusion.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that, upon further consideration, writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.

Certificate of Counsel.

I, the undersigned, counsel for the above-named petitioners, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

ERNEST GEORGE WILLIAMS,
DEMETRIOU & DEL GUERCIO,
RICHARD A. DEL GUERCIO,
RONALD J. DEL GUERCIO,
Attorneys for Petitioners.

APPENDIX

APPENDIX A.

Tax Court Rules of Practice, Rule 31 (b):

* * *

(1) *Stipulations required.*—The Court expects the parties to stipulate evidence to the fullest extent to which complete or qualified agreement can be reached including all material facts that are not or fairly should not be in dispute.

* * *

(4) *Objections.*—Any objection to all or any part of a stipulation should be noted in the stipulation, but the Court will consider any objection to stipulated facts made at the trial. [*As amended Jan. 15, 1957.*]

* * *

(6) *No evidence received to alter or contradict.*—The Court may set aside a stipulation in whole or in part where justice requires, but otherwise will not receive evidence tending to qualify, change, or contradict any fact properly introduced into the record by stipulation.